longer in occupation of the land. To this contention, I fully agree. What had been done even if it were unlawful cannot be undone. In the circumstances, the plaintiff's entitlement would comprise merely a monetary payment by way of damages for the loss (if any) owed to him by the defendants' acts committed prior to the completion of the road over the land. I am also of the view that prayer (d) asked for by the plaintiff for special damages cannot be sustained for it is a well-settled principle of law that particulars of special damages must be particularized and it is not sufficient to aver a bare assertion that the plaintiff had suffered special damages. I would therefore strike out the said prayer (d) with liberty for the plaintiff to apply. In view of the above, the application of the defendants to strike out the writ and the statement of claim is dismissed subject to the three prayers which have been struck out for the reasons as stated above.

Order accordingly.

Solicitors: *Lim Huck Aik & Co.; Radzi Sheikh Ahmad, Noor & Farid.*

TAN ENG CHOONG v. FOO KAI YUEN & ANOR.

[A.C.J. (V.C. George J.) July 27, 1987]

[Kuala Lumpur – Civil Suit No. C22-165-86]

Civil Procedure – Summary disposal under Order 43 rule 1(i) of the Rules of the High Court – Order for – Application for – Whether application can be made – Status of contractual agreement made between the parties – Status of parties.

The first defendant invited the plaintiff to join him as a partner in his law practice. The plaintiff agreed and they practised together for a certain time. Later, the plaintiff resigned and left the firm. The plaintiff, thereafter, sought for an account from the first defendant in respect of the firm and certain other consequential orders. The plaintiff took out an application under Order 43 rule 1(i) and obtained a summary disposal of the claim. The first defendant appealed.

Held, allowing the appeal: since the status of the parties and their contractual agreement were far from being clear, moving the court for a summary order under Order 43 rule 1(i) was misconceived.

APPEAL AGAINST SUMMARY ORDER.

Cyrus Das (*P.H. Yeo* with him) for the plaintiffs.

Dominic Puthucheary for the defendants.

Cur. Adv. Vult.

V.C. George J.: The first defendant appealed against the decision of the learned Senior Assistant Registrar in respect of the summary order he had granted for accounts pursuant to Order 43 rule 1(i) of the Rules of High Court.

The first defendant had invited the plaintiff to join him as a partner in his law practice. The plaintiff accepted the invitation and they practised under the name and style K.Y. Foo & Co. The plaintiff says that the terms of the partnership agreement are as set out in a letter he had drafted which is exhibited as TEC-1 to the plaintiff's affidavit encl. (4). The first defendant on the other hand says that TEC-1 does not reflect all the terms of the partnership agreement. He says that the terms are as set out in paragraph 2(b) of the statement of defence.

After the two parties functioned as partners for about a year, it would appear that the first defendant informed the plaintiff that he should leave the partnership. The plaintiff thereupon sent a letter of resignation to the first defendant to be effective on March 30, 1984 but the first defendant told the plaintiff that he should leave at the end of February 1984. The plaintiff left the practice.

In 1986, the plaintiff caused this writ to issue and sought thereby for an account from the first defendant in respect of the firm and for certain consequential orders. The plaintiff went on to take out an application under Order 43 rule 1(i) and obtained a summary disposal of the claim for an account and the consequential orders.

The first defendant had contended and contends in the appeal that the plaintiff is not entitled to an account in respect of the legal practice on the grounds that the plaintiff in fact had never been a partner of the firm. It was contended that the position that obtains in this case was that the plaintiff had functioned on the basis that the terms of the partnership were as set out in the draft of his said letter TEC-1 whereas the first defendant had functioned on the basis that the terms were as set out in paragraph 2(b) of the statement of defence. The first defendant's contention is that in that

situation there was in fact no contract within the meaning of the Contracts Act between the parties and that accordingly there had been no partnership and as such the first defendant was not obliged to render an account in respect of the firm to the plaintiff.

In answer to this submission, it was suggested on behalf of the plaintiff that the provisions of the Contracts Act had no relevance to a partnership. I find no merit in such a contention. A partnership is a contractual relationship which subsists between persons carrying on business in common with a view to profit. The mutual rights and duties of the partners may be set out in a partnership agreement or deed and if not are as provided in Part IV of the Partnership Act 1961.

"21. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

22. ...

23. ...

24. ...

25. ...

26. The interests of partners in the partnership property, and their rights and duties in relation to the partnership, shall be determined, subject to any agreement, express or implied, between the partners, by the following rules:

(a) all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm;

(b) the firm must indemnify every partner in respect of payments made and personal liabilities incurred by him –

(i) in the ordinary and proper conduct of the business of the firm; or

(ii) in or about anything necessarily done for the preservation of the business or property of the firm;

(c) a partner making, for the purposes of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of eight per cent per annum from the date of the payment or advance;

(d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him;

(e) every partner may take part in the management of the partnership business;

(f) no partner shall be entitled to remuneration for acting in the partnership business;

(g) no person may be introduced as a partner without the consent of all existing partners;

(h) any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners; and

(i) the partnership books are to be kept at the place of business of the partnership (or the principal place, if there are more places than one) and every partner may, when he thinks fit, have access to and inspect and copy any of them."

The scheme of the Partnership Act in general and the terms of Part IV thereof in particular make it clear and it is my judgment that the provisions of the Contracts Act have application to a partnership agreement or deed.

Accordingly, it is relevant to look at some sections of the Contracts Act, *viz:*

"10.(1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

11. ...

12. ...

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

14. Consent is said to be free when it is not caused by –

(a) coercion, as defined in section 15;

(b) undue influence, as defined in section 16;

(c) fraud, as defined in section 17;

(d) misrepresentation, as defined in section 18; or

(e) mistake, subject to sections 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake."

In the instant case, the first defendant appears to be invoking section 13 of the Contracts Act to be read with section 14(e) in saying that what had happened was that the plaintiff and the first defendant had not agreed upon the same thing in the same sense and that accordingly the agreement between the parties cannot be said to have been made with the free consent of the parties and that

accordingly there was no contract between the parties.

This might lead to some absurd conclusions and consequences but at this stage of the proceedings the court is in no position to conclude that it is clear that the first defendant is an accounting party. It seems to me that the court could eventually after trial arrive at one of three conclusions:

(1) That there was a partnership in terms as set out in exhibit TEC-1.

(2) That there was a partnership in terms as set out in paragraph 2(b) of the statement of defence.

(3) That the plaintiff was under the impression that the terms were as set out in TEC-1 and the first defendant was under the impression that the terms were as set out in paragraph 2(b) of the statement of defence.

If the court concludes that there was an agreement between the parties in the terms of (1) or (2) above, then it will be held that there was in existence a partnership between the parties and accounts will be ordered to be rendered. If, however, the finding is as *per* (3) above then the court could very well conclude that the contract of partnership was not made by the free consent of the parties in that they had not agreed upon the same thing in the same sense. As has been seen earlier, it could be envisaged that this might lead to some absurd consequences which possibility may be put forward as an argument in support of the contention that the court should not arrive at such a conclusion. Be that as it may, as I have stated earlier, the position is far from clear and as such, moving the court for a summary order under Order 43 rule 1(i) was misconceived.

The appeal is allowed with costs. The order of the Senior Assistant Registrar of November 28, 1986 is set aside.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

BINA SATU SDN. BHD. v. TAN CONSTRUCTION

[O.C.J. (V.C. George J.) July 18, 1987]

[Kuala Lumpur – Originating Summons No. D3-31-86 of 1987]

Companies and Corporations – Petition to wind up company – Injunction to restrain petition – Application for – Preliminary objection to application – Whether section 54(b) of the Specific Relief Act 1950 removes power of court to grant injunction – Section 54(b) – Explanation of.

Civil Procedure – Injunction to restrain winding-up petition – Application for – Preliminary objection to application – Whether section 54(b) of Specific Relief Act 1950 removes court's power to grant injunction – Explanation of – Specific Relief Act 1950, ss. 50, 52-55.

The plaintiff owed the defendants a certain amount of money. The defendants demanded payment and the plaintiff was unable to pay the money. The defendants petitioned the court to wind up the plaintiff claiming that the plaintiff was unable to pay its debts. The plaintiff sought an injunction to restrain the defendants from petitioning the court to wind up the plaintiff.

The defendants submitted on a preliminary point, namely, that the power to grant the injunction sought was not founded upon statute but an inherent jurisdiction which power had been excluded by statutory prohibition, namely, section 54(b) of the Specific Relief Act 1950 (Revised 1974).

Held, overruling the preliminary objection: (1) section 54(b) should be read as having reference to only perpetual injunctions. In the present case, the injunction sought was a temporary injunction;

(2) section 54(b) relates to injunctions imposed on other courts and not to injunctions imposed on the parties to the litigation. The injunction sought in the present case was to restrain the defendants and not the court.

Cases referred to:

(1) *Re A Company* [1894] 2 Ch. 349.
(2) *Cadiz Waterworks Co.* v. *Barnett* L.R. 19 Eq. 182.
(3) *Tan Suan Choo* v. *Majlis Perbandaran Pulau Pinang* [1983] 1 M.L.J. 323.
(4) *Cotton Corpn. of India* v. *United Industrial Bank* A.I.R. 1983 S.C. 1272.

COMPANIES WINDING UP.

Y. L. Tho for the plaintiffs.

G. Sri Ram (*R. Muthu* with him) for the defendants.

Cur. Adv. Vult.

V.C. George J.: An important question that arose in this matter was whether the court had the